TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 11th February, 2010

Petition No.271(C) of 2008

M/s Ambati Communications …Petitioner

Versus

M/s Ushodaya Enterprises Ltd. …Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.G.D. GAIHA, MEMBER

For Petitioner : Mr. Navin Chawla, Advocate
Mr. Sharath Sampath, Advocate

For Respondent : Mrs. Neelima Tripathi, Advocate
Mr. Prabhat Ranjan, Asstt.Manager (Legal)

ORDER

S.B. Sinha

The petitioner which is a proprietory concern of one Mr.Ambati Rambabu, has filed this petition inter alia questioning a public notice dated 04.12.2008 issued in terms of Regulation 4.3 of the Telecommunication (Broadcasting & Cable Services) Interconnection (Third Amendment) Regulations 2006 being Regulation No.10/2006 (The Regulations).

The factual matrix involved in the matter is as under:

The petitioner is an MSO. It used to operate in and around the town of Guntur in the State of Andhra Pradesh. It entered into a subscription agreement dated 31.01.2006 with the respondent which was valid for the period 01.02.2006 to 31.01.2007.

There exists a dispute as to whether the said agreement has been renewed or not. Whereas according to the petitioner another subscription agreement was entered into by and between the parties hereto in June, 2008, the respondent categorically denies and disputes the same. It is, however, not in dispute that on and from June, 2009 the parties have not entered into any subscription agreement. We may, however, place on record that the respondent prior to issuance of the aforementioned public notice also served notice upon the petitioner in terms of clause 4.1 of the Regulations by its letter dated 27.10.2008. It also stands admitted that even prior thereto the respondent has served a notice upon the petitioner on or about 16.10.2008.

Mr.Navin Chawla, learned counsel appearing on behalf of the petitioner would contend:

(i) The agreement dated 31.01.2006 does not contain any description in regard to the area of operation and the same having only mentioned “list of operators to be submitted later on”, the allegations contained in the public notice that the petitioner has encroached into other areas without permission of the respondent must be held to be erroneous.

(ii) Despite the fact that the respondent denies and disputes entering into a fresh agreement in June 2008, the notice issued under Regulation 4.1 and the public notice issued under Regulation 4.3 stated that the agreement had expired which would clearly demonstrate that another agreement was entered into.

(iii) The petitioner's letter dated 12.11.2008, issued in response to the respondent's letter dated 16.10.2008 and notice in terms of clause 4.1 dated 21.07.2008 having not been replied, it must be presumed that the contents thereof have been admitted.

(iv) The petitioner having paid excess amount of subscription fee for 1060 subscribers in respect of 15 areas of operation as would appear from the letter dated 05.12.2008 and the respondent, having accepted the said payment without any demur whatsoever, would be deemed to have waived the notice issued under clause 4.3 of the Regulations.

(v) The petitioner having not been operating in the extended area from April, 2009 in the interest of justice also, the public notice should be quashed.

Mrs.Neelima Tripathi, learned counsel appearing on behalf of the respondent, on the other hand, has drawn our attention to the statements made in paragraph 4 of the petition and urged:

(i) The petitioner itself in paragraph 4 of the petition having stated that it had entered into a partnership agreement with one Digi Cable and the rejoinder affidavit having been filed by the proprietor of the petitioner- concern as an Associate Director of Digi Communications Network Pvt. Ltd. and in paragraph 1 the name of the company has been shown as M/s Digi Guntur Network Pvt. Ltd., this petition is not maintainable.

(ii) The petitioner in various correspondences as also the pleadings having admitted expansion of its activities, no relief can be granted to it.

(iii) The petitioner in any event having not informed the respondent about its merger with a company and/or partnership firm must be held to have committed a breach of the agreement and in that view of the matter too, would not be entitled to relief.

(iv) As in terms of the agreement, the petitioner was obligated to obtain prior permission before expansion of its activities and having not done so, no relief can be granted to it.

(v) The petitioner having admitted that the decoders had been issued to various local operators operating in the areas where the petitioner had been operating and the same having not been returned, it must be held to have committed a further breach of contract.

From the rival contentions of the parties, as noticed hereinbefore, the principal questions, which arise for our consideration, are:

(a) Whether the public notice dated 04.12.2008 issued by the respondent is legal and valid?

(b) Whether the petitioner is entitled to renewal of the subscription agreement on negotiated terms with the respondent.

(c) Whether the respondent should be restrained from the de-activating or disturbing the supply of various TV channels to the petitioner.

The fact that the petitioner is a proprietory concern is not in dispute. As a proprietory concern it is not a legal entity although in terms of Order 30 Rule 10 of the Code of Civil Procedure (Code), it may sue or be sued in its name through its proprietor. The contractual rights and obligations of a proprietory concern is that of the proprietor. As a proprietory concern, the petitioner cannot claim any independent right.

Indisputably the period of agreement was from 01.02.2006 to 31.01.2007. We do not know as to under what circumstances despite expiry of the said agreement the petitioner had been continuing to transmit signals of various channels belonging to the respondent company. But the fact remains that it had been. The Regulations provide for a period of three months for entering into a fresh agreement from the date of expiry thereof. It is only in that context the petitioner must be held to have made an averment that it had entered into another subscription agreement in the month of June, 2008 which as noticed hereinbefore has categorically been denied or disputed by the respondent. The petitioner has not produced a copy of the said agreement nor has advanced satisfactory evidence to show that such an agreement in writing has been entered into.

We would, however, for the purpose of this petition shall proceed on the basis that the respondent has permitted the petitioner to continue to transmit the signals of its channels despite expiry of the said agreement. It may, however, be noticed that in paragraph 4 of the petition, the petitioner itself has stated as under:

> "4. That the parties had entered into a Subscription Agreement for the current year sometime in the month of June 2008 when the Petitioner entered into a partnership with one Digi Cable, which is also operating as an MSO in other parts of the country. It was agreed that with the capital contribution from Digi Cable, the Petitioner would be expanding its area of operation and for which further amounts would become payable by

the Petitioner to the Respondent. Such amounts were to be determined through negotiations and on a non-discriminatory and reasonable basis, taking into account the subscription fee paid by other MSOs in the area."

The petitioner, thus, has not categorically raised a contention as to whether the new subscription agreement was entered into by and between the partnership firm or the petitioner or not. If a partnership firm had come into existence, the petitioner should have disclosed its names, if not the name of its partners. In any event the petitioner should have at least filed a copy of the Deed of Partnership in these proceedings. For reasons best known to it, the petitioner has failed and/or neglected to do so. At no point of time the petitioner has brought to the notice of this Tribunal that it has merged with a company registered and incorporated under the Indian Companies Act, 1956. It has rightly been brought to our notice that the proprietor of the petitioner, Ambati Rambabu while affirming an affidavit to the Rejoinder described himself as Associate Director of Digi Communications Network Pvt. Ltd. whereas in the first paragraph thereof he described himself as an Associate Director of M/s Digi Guntur Network Pvt. Ltd. i.e. two different companies which are separate legal entities having been incorporated and registered under the Indian Companies Act separately. We do not know which of the said two companies has taken over the the partnership business of the petitioner as the same has not been disclosed.

The fact remains that this Tribunal has not been apprised of as to whether even on and from June 2008 a partnership firm has been running the business of transmission of signals in the area in question and how and in what manner any of the aforementioned companies has taken over the said business.

It is true that a partnership also is not a separate legal entity but there cannot be any doubt or dispute that a partnership firm can sue and be sued in its own name as provided for in Order 30 Rule 1 of the Code. A partnership firm can also be an assessee under the Indian Income Tax Act in its own name.

In Tanna & Modi Vs. CIT - 2007(7) SCC 434, the Supreme Court of India has, inter alia, stated the law, thus:

> "15**.** There cannot be any doubt that under the Income Tax Act, a firm whether registered or not under the provisions of the Partnership Act is treated as a separate assessee. An order of assessment is passed on the basis of income derived by a person. His total income may consist of his share of profit out of the income of the firm.
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> 16**.** It may be true that in that view of the matter, assessment of a firm and assessment of a partner would stand on different footings.
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> 17**.** For the purpose of the application of the provisions of the Income Tax Act, 1961 and the Voluntary Disclosure of Income Scheme, 1997, a firm and its partner may have to be treated differently as a partner of a firm may have income other than his share of profits from the firm."

So far as the mercantile notion in respect of a firm is concerned, it has to be treated to be separate from that of the partners.

In Partnership Act by Shri Avtar Singh at page 34, it is stated as under:

> "**Mercantile Notion**
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> Merchants tend to regard their firm as something separate from them. The business of the firm is considered as a separate unit. The firm is the real businessman and the partners are only its working parts. Businessmen talk

of a firm in a manner which shows that their firm is a real thing. They talk, for example, of the name of the firm, the assets of the firm, the accounts of the firm, debts and obligations of the firm, rights and liabilities of the firm, the banking accounts of the firm, and so forth. Moneys paid by partners to the firm are reflected in the accounts by debiting the firm and crediting the respective accounts of the partner's account with a matching credit to the firm. Thus partners may be sometimes the creditors of the firm or its debtors. They are not considered to be their mutual creditor-debtors. They consider their firm as a continuing entity. In express recognition of this fact deeds of partnership often provide that goodwill shall be the property of the firm; that the firm will not be dissolved by the death, retirement or insolvency of a partner or that notwithstanding any change in membership, the firm will remain the same entity."

There cannot be any doubt or dispute whatsoever that the legal notion of a partnership firm would vary from statute to statute but if the partnership firm had taken over the business of the proprietorship concern, indisputably the petitioner before us should have been the partnership firm and not the petitioner in its present form. In any event, it is admitted that a change in the constitution of the concern has taken place during the pendency of these proceedings. The petitioner does not say that despite the aforementioned companies or any of them having taken over the business concern of the petitioner, it is being maintained as a separate legal entity or it could continue to carry on in these proceedings.

Having regard to the provisions contained in Order 22 of Rule 10 of the Code of Civil Procedure and/or principles analogous thereto, it was obligatory on the part of the petitioner to get itself substituted in terms thereof.

No such step having been taken, we are of the opinion that no relief can be granted in the present petition in favour of the petitioner in its present form as neither any agreement can be directed to be entered into in the name of petitioner nor any order of injunction can be passed in its favour and against the respondent.

Furthermore, in terms of the agreement itself the petitioner was obligated to take permission of the respondent and/or to inform it in the event of any merger or amalgamation had taken place.

For the said purpose, we may set out clauses 12(g) and 23.7 of the agreement which are as under:

"12(g) In the event of merger or amalgamation of the Affiliate with another entity or if the Affiliate ceases to carry on the business of the cable operator and does not require the Viewing Card given to the Affiliate by the Licensor, the Affiliate shall intimate the same to the Licensor immediately and shall take steps to forthwith return the Viewing Card to the Licensor. In the event of failure of the Affiliate to return the Viewing Card to the Licensor, the Affiliate shall be liable to pay a sum of Rs.5,00,0000/- (Rupees five lakhs only) per day during which the default continues.

23.7 Assignment

The Affiliate shall not have the right without the prior written consent of Licensor, to assign or transfer this Agreement or any of its rights or obligations with respect to the distribution systems."

It is not the case of the petitioner that the requirements of the said provisions have been complied with.

So far as the action on its part in expanding the area of operation is concerned, Mr.Chawla may be correct in its contention that in the agreement dated 31.01.2006 the area had been kept blank. But it was stated "list will be submitted later". This Tribunal in absence of any plea taken in this behalf will have no other option but to proceed on the assumption that in fact a list

of operators was submitted later. These findings of our get reinforced having regard to the statements made by the petitioner itself in its rejoinder affidavit which read as under:

> "4. It is submitted that, the contents of the para 4 & 5 of the petition are reiterated and the proposed extension by the petitioner in association with Digi Cable was clearly informed to the local executive as well as respondent's office. Therefore, all such allegations made by the respondent that extension of the areas of the operation since June, 2008 by the petitioner was done without obtaining permission from the respondent is absolutely false and the respondent is put to strict proof of the said allegation. It is denied that the petitioner failed to show any initiative to either inform the respondent of its partnership with Digi Cable. Further, the contents of the letter referred as R4 are reiterated, since the said letter and the contents contained therein were not denied by the respondent until the above petition was filed before this Hon'ble Tribunal. Further, the contents of the said letter clearly disclose the intention of the petitioner to have a fresh subscription agreement with the respondent and the same is not denied by the respondent.
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> It is further submitted that all the correspondence referred to by the respondent seeking renewal of the subscription agreement are addressed for record purposes without a true intention to have a fresh subscription agreement on such terms and conditions reasonable to the parties. Further, there has been no correspondence whatsoever from the respondent till date demanding the details of the partnership between the petitioner and Digi Cable and denying or refusing to receive the payment of the subscription amount under the covering letter dated 5.12.08 for the extended connectivity for the D.D. enclosed therein was encashed, thus making it clear that the allegations of the respondent, that, petitioner transgressed into areas beyond the permitted area of operation and non

renewal of the subscription agreement are only contrived for the purposes of setting up a defence in the present petition.

9-14. It is submitted that, the assertion of the respondent that, the payment offered by the petitioner for the additional connectivity in the transgressed areas does not make the transgression permissible or proper is absolutely false and vehemently denied by the petitioners. The contents in the reply dt.12.11.09 sent in response to the notice of the respondents dt.27.10.08 are once again reiterated and on the contrary if the version of the respondent is true nothing prevented the respondent from denying or disputing the contents of the said communication of the petitioner dt.12.11.08 and for that matter respondent did not even dispute or reject the payment made on 5.12.08 vide petitioner's communication dt.5.12.08, setting out the details of the added connectivity and the payment is respect of the same, further respondent received similar payments every month at Rs.12,505/- till March, 2009 without any protest. Therefore, it does not lie in the mouth of the respondent to raise the said contention now in the reply and the contention of the respondent that the said payment was unilateral cannot be counternanced at this stage, which is clearly an afterthought and formulated for the purposes of depriving the petitioner of the relieves claimed in the present petition. Petitioner reiterates that, the act or extension into new areas was only done with prior intimation and consensus of the respondent pending execution of the fresh agreement which could not be materialized due to the unreasonable, irrational and exorbitant demand for subscription amounts for 28000 sub-base in the guise of the petitioner being permitted to extend its area of operation. Respondent in that instant case is blowing hot and cold by permitting on one hand the petitioner to extend by receiving payment for such extended connectivity for the months of December, 2008 to March, 2009 and on the other hand projecting the case as if the

petitioner is not coming forward for execution of subscription agreement, suppressing the unreasonable demand for subscription amounts.

All the other submissions contained in the said paras 9 to 12, which are specifically denied hereinabove shall be deemed to have denied. Petitioner reiterates that the extension whatever carried out till date is with the full knowledge, prior intimation & information to the respondent and the very fact that, the respondent has not explicitly denied or disputes the contents contained in the communication dt.12.11.08 & 05.12.08 prior to the filing of this petition or prior to the release of the paper publication which is indeed issued without preceded by a notice under regulation 4.1 of the Interconnection regulations."

Our attention has also been drawn by Mr.Chawla to the following statement:

"It is submitted that the allegations and the submissions contained in the reply are incorrect, untrue and are only contrived for the purposes of creating a defence to the pleadings of the petitioner and are devoid of merits. Petitioner is not in due of any amounts to the respondent and petitioner asserts that since April,2009, no signal services are extended to the affiliates/ areas mentioned in the list furnished to the respondent on 05.12.2008, since the said affiliates are being catered with signals services by Harika Cable Vision, Tenali."

Before, however, we advert thereto, we may also notice that the petitioner in its reply to the respondent's notice under Regulation 4.1 of the Regulations stated as under:

"We are in receipt of your notice dated 27th October, 2008 and deny your statement that we have transgressed your outside our network, as a matter of fact, you are fully aware of our areas of operation and also kept your executives

informed regarding the proposed new affiliates, your executive Mr.Rajesh, who has been informed in the last week of September, assured us of conducting inspection and the said issue was also discussed with one Mr.Hari Prasad, from head office, Hyderabad, during his visit to our office on 06.10.2008 and also handed over a copy of the proposed affiliates in the rural areas to him, who had also assured us of verification, but no such verification took place till date, on the other hand we are served with a notice alleging transgression into 29 areas.

Out of the said 29 areas said to have been encroached by us, you are fully aware that operators in the areas of Kuchipudi, Duggirala, Chilumuru, Manduru, Chinaparimi, Karimurivaripalem, Vittaramalapalli, Sajjanapeta, Peravalipalem, Kampani and Vemurupalli, already have your decorders, therefore, the question of encroachment into their areas is baseless, further the said list of cable operators whom we proposed to affiliate, which was already submitted to your local executive as well as Mr.Hari Prasad on 05.10.08 the proposed connectivity is mentioned therein as 1060 and we are ready to pay for the same as informed by us well in advance to your local executive and Mr.Hari Prasad who have though consented initially, but got issued a notice from your end without any physical verification. We are once again enclosing a copy of the proposed affiliates in rural areas, which was already submitted."

Whereas the oral permission taken by the petitioner from one Mr.Rajesh in presence of one Mr.Hari Prasad is denied and disputed, implicitly it stands admitted that the petitioner had been operating in 29 areas apart from the areas it was entitled to operate. It is in the aforementioned situation only that the subscriber base even according to the petitioner has gone up to 1060.

The petitioner, as noticed hereinbefore had been offering to make payments after publication of the public notice dated 04.12.2008 and in fact has made such payment by a cheque.

There cannot, thus, be any doubt whatsoever that in the public notice it was correctly stated that the petitioner had been transmitting signals beyond the areas specified in the agreement.

The only question which survives is as to whether the respondent having accepted the payment purported to have been made by the petitioner for the increased number of subscribers for the months of December, 2007 to April 2008 is estopped and precluded from giving effect to the public notice. The public notice has not been given effect to only by reason of an interim order passed by this Tribunal. The same in law would have taken effect but for the interim order passed by this Tribunal. The effect of an interim order would be that it would be made permanent irrespective of the fact as to whether any relief can be granted to the petitioner or not. If no relief can be granted to the petitioner, this Tribunal will have no other option but to vacate the interim order. In that event the public notice has to be given effect to.

We may also place on record that we have not gone into the question in which areas the petitioner has expanded its activity and/or whether having regard to the acts of commission and omission on the part of the petitioner, the respondent can initiate separate action to enforce its other or further rights and obligations therefor, if any, being outside the purview of determination of this Tribunal no observation in regard thereto can be made.

For the reasons aforementioned this petition is dismissed with costs. Counsel's fee assessed at Rs.50,000/-.

…….... J
(S.B. Sinha)

Chairperson

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(G. D. Gaiha)
Member